

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL )  
DEVELOPMENT PERMIT ISSUED BY SAN )  
JUAN COUNTY TO V. NORMAN CARPENTER)

JAMES R. SISLEY, ARTHUR L. )  
MALMGREN AND NANCY MALMGREN, )

Appellants, )

v. )

SAN JUAN COUNTY AND V. NORMAN )  
CARPENTER, )

Respondents. )

SHB Nos. 79-5 and 79-36

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the request for review of a substantial development permit issued by San Juan County to V. Norman Carpenter, came on for hearing before the Shorelines Hearings Board, Nat W. Washington, Chairman, Chris Smith, David Akana, Delmon Anderson and Richard A. O'Neal, on December 13 and 14, 1979 at Westsound, Orcas Island. Hearing examiner William A. Harrison presided.

Appellants James R. Sisley and Nancy L. Malmgren appeared and

1 represented themselves; respondent V. Norman Carpenter was represented  
2 by his attorney, Duncan A. Bonjorni; respondent San Juan County was  
3 represented by its Prosecuting Attorney, E. H. Knapp, Jr. Reporter  
4 Marilyn Hoban recorded the proceedings.

5 Having heard the testimony, having examined the exhibits, having  
6 viewed the site of the proposed development, having heard legal  
7 argument, and being fully advised, the Shorelines Hearings Board makes  
8 the following

#### 9 FINDINGS OF FACT

##### 10 I

11 This matter arises in Deer Harbor, a small, southerly facing  
12 sheltered bay near the west tip of Orcas Island in San Juan County.

13 In October of 1972, respondent Carpenter filed with San Juan  
14 County an application for a substantial development permit under the  
15 Shoreline Management Act of 1971, chapter 90.58 RCW. The proposed  
16 development consisted of a 94-slip marina at the head of Deer Harbor.  
17 It would embrace 6-1/2 acres, 3-1/2 acres of state owned aquatic land,  
18 managed by the State Department of Natural Resources, and three acres  
19 of privately owned tidelands and uplands. The planned structure would  
20 involve piling, finger piers and docks extending some 600 feet into  
21 the Harbor. The contemplated upland support facilities included 27  
22 parking spaces, an office and boat launching ramp.

23 The following events, inter alia, have since transpired:

24 1. On October 12 and 19, 1972, notice of Carpenter's application  
25 for substantial development permit was published in an  
approved legal newspaper, the Friday Harbor Journal.

26 2. On December 15, 1972, the Board of San Juan County

Commissioners granted to Carpenter the substantial development permit (No. SJ-25) for which he applied.

3. On February 21, 1973, the State Department of Ecology (DOE) filed a timely request for review of the Carpenter permit before the Shorelines Hearings Board. This matter, SHB No. 52, was disposed of without litigation through our entry of the consent order presented by DOE, Carpenter and San Juan County on May 23, 1973. That order dealt only with the septic tank and drainfield system and required DOE and County approval of it.
4. On July 3, 1973, after due application, notice and comment, the U.S. Army, Corps of Engineers, issued its permit for the proposed development.
5. On December 1, 1972, Carpenter applied for lease of state aquatic lands. On August 15, 1973, Carpenter telephoned the State Department of Natural Resources to request permission to drive piling on state owned aquatic lands. An official of the Department of Natural Resources orally granted permission to drive the piling. Carpenter drove all piling required for the marina. The Department of Natural Resources issued a lease to Carpenter (No. 10033) on December 7, 1973, although the lease encompassed only the landward 2/3 (approximately) of the area applied for.
6. On March 21 and 28, 1974, notice of an action was published as provided in RCW 43.21C.080 of the State Environmental Policy Act (SEPA). Publication was in the Friday Harbor Journal.
7. On May 18, 1974, the appellants in this matter and others, filed a class action against Carpenter and San Juan County in the Superior Court for San Juan County. By stipulation of the parties all permits were suspended and the matter remanded to the Board of San Juan County Commissioners for determination whether an environmental impact statement (EIS) was required for the proposed development under SEPA, chapter 43.21C RCW. Following notice and hearing the Board of San Juan County Commissioners voted 2-1 on March 3, 1975, that an EIS need not be prepared. The Superior Court for San Juan County, upon review, dismissed the action against Carpenter and San Juan County on November 24, 1975.
8. In June, 1976, Carpenter began to construct docks and slips as well as upland portions of the marina. Appellants here and others appealed the decision of the Superior Court for San Juan County and the matter was certified by the Court of

1 Appeals to the Supreme Court. Prior to the decision of the  
2 Supreme Court docks and slips were completed coincident with  
3 the extent of the DNR lease (No. 10033, supra at paragraph 5)  
which covers approximately 2/3 of the total docks and slips  
proposed for development.

4 9. On September 22, 1977, the Supreme Court unanimously ruled  
5 that the decision not to prepare an EIS was clearly  
6 erroneous. The cause was remanded to the Board of San  
7 Juan County Commissioners for preparation of an EIS.  
8 Sisley v. San Juan County and Carpenter, 89 Wash.2d 78,  
9 569 P.2d 712 (1977).

10 10. Thereafter a draft EIS was prepared, notice was given,  
11 comments were received from government agencies and  
12 individuals, and a final EIS was prepared.

13 11. On August 22, 1978, after notice, the Board of San Juan  
14 County Commissioners convened a public hearing on Orcas  
15 Island "to review the permits issued and make a  
16 determination whether said permits should be renewed  
17 and extended".

18 12. On September 25, 1978 the Board of San Juan County  
19 Commissioners adopted a "Resolution" (128-1978) approving  
20 the EIS and declaring the original substantial development  
21 permit (December 15, 1972, paragraph 2, supra) to be  
22 "renewed and extended". This Resolution is now before  
23 us for review as SHB No. 79-5.

24 13. On June 19, 1979, after notice published May 30 and June 6 in  
25 the Friday Harbor Journal and mailed on May 24, 1979 to  
26 appellants, the Board of San Juan County Commissioners  
27 conducted another public hearing on the proposed marina.

14. On June 19, 1979, the Board of San Juan County Commissioners  
granted a second shoreline substantial development permit  
(No. 25SJ72) to Carpenter. This permit is now before us  
for review as SHB No. 79-36.

## 21 II

22 The development as proposed is set forth in the text and  
23 illustrations of Section 5.E. of the draft EIS.

## 24 III

25 The proposed marina would provide only permanent moorage for year  
26 around storage of pleasure craft. This is a use having a low level of  
27

1 human activity relative to transient moorage. There is a substantial  
2 need for permanent moorage in the San Juan Islands. One estimate is  
3 that, in 1966, demand exceeded supply by 427 moorages and, in 1980,  
4 will exceed supply by 1200 moorages.

5 A marina such as the one proposed would meet this demand by  
6 concentrating moorages at a single location. This would be less  
7 environmentally harmful and less obstructive to navigation than  
8 individual piers associated with private homes.

9 Deer Harbor's eastern shore is presently the site of a large  
10 marina and resort catering to transient boaters. Historically, the  
11 Harbor has seen considerable commercial use. In 1859 Louis Cayou was  
12 stationed in Deer Harbor by Hudson's Bay Company to obtain venison for  
13 sale in Victoria. The name Deer Harbor is derived from this. In 1914  
14 Louis' son, Henry Cayou, established the Deer Harbor Fish Cannery on  
15 the site where the Carpenter marina is proposed. This cannery  
16 continued in operation until 1951. In 1920, another cannery was built  
17 on the east side of the Harbor and operated for a few years. In 1946  
18 a saw mill was built at the point where the county road crosses the  
19 tidal lagoon at the northerly end of the Harbor. The mill continued  
20 in operation until 1970 and its remains are still present.

21 The factors which have made Deer Harbor suitable for water-related  
22 commercial use in the past are likewise conducive to construction of a  
23 marina with minimum environmental disruption. Because the Harbor  
24 waters are deep, no dredging or excavation is required. Because the  
25 Harbor's high western flank protects it from the prevailing west

1 winds, no breakwaters are required. An established county road passes  
2 through the on-shore portion of the site.

3 The proposed floating docks (connected to the bottom only by the  
4 piling which secures them) pose no danger to and may enhance marine  
5 life. The evidence was not persuasive that the proposed marina would  
6 have a significant adverse effect on shorebirds or waterfowl.

7 Although water surface occupied by the proposed marina would be  
8 unnavigable, the marina is a water dependent use which by its nature  
9 fosters more public access to the water than it denies. The channel  
10 entrance to the northerly tidal lagoon would be decreased to  
11 approximately 290 feet clearance between the proposed marina and  
12 appellant's private moorage lying opposite. Discharge of sewage and  
13 oil from boats using the marina does pose a potential problem to water  
14 quality and marine life.

15 The proposed marina would place in the Harbor, at some 250 yards  
16 distance from appellant's seasonal residence, a row of pleasure  
17 craft. Some of these will be sailboats whose masts will be  
18 superimposed on appellant's view of the Olympic Mountains on those  
19 days when the mountains are visible. Appellants contended but did not  
20 establish that the addition of these pleasure craft to their view  
21 would reduce the value of their property.

#### 22 IV

23 The EIS contains a discussion of five alternatives to the proposed  
24 action (EIS, pp. 86-87). The discussion is sufficiently detailed to  
25 permit a comparative evaluation of the proposed action and each  
26 alternative, including the "no-action" alternative.

1 Existing environmental conditions are discussed as well as the  
2 proposal's impact on the environment. (EIS, pp. 21-82). Both the  
3 human and physical environment are considered. Conclusions are  
4 supported by both a reference bibliography (EIS, p. 89) and  
5 observations or tests made at the site. E.g., EIS, pp. 22, 29, 41,  
6 and 43).

## 7 V

8 The Shoreline Master Program adopted by San Juan County was  
9 approved by the State Department of Ecology in October, 1976. WAC  
10 173-19-360. The Master Program designates the shoreline area at the  
11 subject site "Suburban" to the line of ordinary high tide and  
12 "Aquatic" from that line seaward. (San Juan County Shoreline Master  
13 Program Designated Environments Map, Exhibit A-15). Marinas are a  
14 permitted use in the Suburban and Aquatic environments where the two  
15 abut. Master Program, Sec. 5.13 Marinas, p.44 Regulations by  
16 Environment. A policy for marinas states:

17 Boat storage should be designed  
18 to optimize the trade-offs between  
19 the number of boats served and the impacts  
20 on the natural and visual environments.  
(Master Program, Sec. 5.13, Marinas  
Policy No. 4, p. 43).

## 21 VI

22 San Juan County Commissioner James R. Klauder participated in the  
23 issuance of both the Resolution (128-1978) and second substantial  
24 development permit (No. 25SH72) for the Carpenter marina.  
25 Commissioner Klauder, as a private citizen, owns and operates an  
insurance office on Orcas Island.

26 In early 1977, Mr. Carpenter purchased a homeowners policy from  
27

1 Mr. Klauder. Upon issuance of the Supreme Court decision in Sisley v.  
2 San Juan County, supra, in September, 1977, Mr. Klauder advised Mr.  
3 Carpenter to cancel the policy and insure elsewhere so as to dispel  
4 even the appearance of conflict. The policy was cancelled prior to  
5 the San Juan County Commissioners' consideration of the Carpenter  
6 marina following the Supreme Court's decision and remand. Mr. --  
7 Carpenter has purchased no further insurance from Mr. Klauder.

8 Mr. Klauder sold an automobile insurance policy, in 1975, to a  
9 partner of Mr. Carpenter in the marina project, a Mr. McBriar. This  
10 policy remains in effect.

11 Mr. Klauder sold an insurance policy on rented real estate, upon  
12 which a claim was filed with directions to send the proceeds to Mr.  
13 Sisley, appellant in this matter. This policy was canceled in May,  
14 1979.

## 15 VII

16 Any Conclusion of Law which should be deemed a Finding of Fact is  
17 hereby adopted as such.

18 From these Findings the Board comes to these

## 19 CONCLUSIONS OF LAW

20 Appellants raise five objections to the County's approval of the  
21 Carpenter marina: 1) the Resolution (128-1978, September 25, 1978) is  
22 unlawful and void, 2) the public communication process carried out by  
23 the County is inadequate, 3) the EIS is inadequate, 4) the approval is  
24 contrary to the Master Program, the Shoreline Management Act, and the  
25 substantive protection afforded by SEPA and 5) Commissioner Klauder's  
26 participation in the approval violated the appearance of fairness  
27



1 doctrine. We now consider these in turn.

2 I

3 The Resolution (128-1978, September 25, 1978) of the Board of San  
4 Juan County Commissioners which purported to renew and extend the  
5 original substantial development permit (No. SJ-25, December 15, 1972)  
6 is invalid for that purpose and does not constitute a new substantial  
7 development permit.

8 Although it did not so state expressly, we conclude that the  
9 Supreme Court's decision in Sisley v. San Juan County, supra,  
10 invalidated the original substantial development permit (No. SJ-25,  
11 December 15, 1972) as an action taken without an EIS where one is  
12 required. See Byers v. Board of Clallam County Commissioners, 84  
13 Wash.2d 796, 529 P.2d 823 (1974) and ASARCO, Inc. v. Air Quality  
14 Coalition, et al. 92 Wash.2d. 685, 601 P.2d. 501 (1979).<sup>1</sup> By  
15 written motion, dated March 23, 1978, and denied at hearing,  
16 respondent San Juan County sought to dismiss this review of the  
17 Resolution by asserting RCW 90.58.180 authorizes review of "the  
18 granting, denying or rescinding of a permit on the shorelines of this  
19 state" within thirty (30) days of the date of filing of that permit.  
20 "The permit in questions [sic], SJ-25, was granted December 15, 1972.  
21 Petitioners have failed to make timely application for review by this  
22

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23  
24 1. It follows that the conditions incorporated into permit SJ-25  
25 by our Order on Stipulation in SHB No. 52 (entered May 23, 1973) are  
now invalid also.

1 Shorelines Hearings Board . . .". We conclude that we have  
2 jurisdiction to review the Resolution in question and that the  
3 original, invalidated substantial development permit (No. SJ-25)  
4 cannot be revived in the fashion attempted by the Resolution.

5 Neither can the Resolution constitute a new substantial  
6 development permit in that it is not substantially in the form  
7 provided for such permits by state regulation, WAC 173-14-120.

8 For these reasons the Resolution is void in all respects excepting  
9 its approval of the EIS.

10 II

11 Appellants contend that the public communication process carried  
12 out by the County was inadequate. We have concluded that the original  
13 substantial development permit (SJ-25, December 15, 1972) was  
14 invalidated by the Supreme Court's decision in Sisley v. San Juan  
15 County in 1977. The information which appellants had received from  
16 the County to that time, coupled with the EIS, was adequate to provide  
17 them with an informed opportunity to argue against the issuance of a  
18 subsequent substantial development permit during the renewed  
19 deliberations by the County which followed the Supreme Court's  
20 decision. The public notice provided by the County was adequate so  
21 far as the matters now before us for review.

22 III

23 Appellants challenge the adequacy of the County's EIS. The  
24 question of the adequacy of an EIS is one of law, Leschi v. State  
25 Highway Comm'n, 84 Wash.2d. 271, 525 P.2d 774 (1974). However, the

1 decision of the governmental agency relative to the adequacy of an EIS  
2 shall be accorded substantial weight. RCW 43.21C.090. Here the  
3 County approved the EIS.

4 Appellants first contend that the EIS does not discuss limiting  
5 the development of the marina and that this constitutes the  
6 "no-action" alternative. We disagree. Reducing the size of the  
7 marina is considered at p. 86 as are four other alternatives,  
8 including the "no-action" alternative of building no marina.

9 Appellants next contend that the EIS does not describe, discuss or  
10 fully set forth all potential adverse impacts. On the contrary, from  
11 pp. 64-82 the EIS treats the proposal's impact upon each aspect of the  
12 physical and human environment set out in the SEPA Guidelines (chapter  
13 197-10 WAC) at WAC 197-10-444. This includes discussion of parking  
14 facilities (Sec. 7.II.C.2 at p. 74), surface water use (Sec. 7.II.C.6  
15 at p. 76), aesthetics (Sec. 7.II.H at p. 80) and economics (Sec. 7.II.  
16 K at p. 81) contrary to appellants' contention that these were not  
17 considered.

18 The EIS conclusions are based upon investigations in part by the  
19 University of Washington Friday Harbor Laboratories, and upon written  
20 source material disclosed in the bibliography. We do not agree with  
21 appellant's contention that these conclusions are unsupported or based  
22 on inadequate investigations by unqualified persons.

23 We conclude that the environmental effects of the proposed action  
24 and reasonable alternatives are sufficiently disclosed, and discussed,  
25 and that they are substantiated by supportive opinion and data.

1 Leschi, supra, at p. 785. We therefore conclude that the EIS is  
2 adequate.

3 IV

4 Appellants raise three specific grounds upon which the County's  
5 approval of the Carpenter marina violates one or all of the Master  
6 Program, Shoreline Management Act or substantive protection of SEPA.  
7 These are 1) that the proposed marina will not promote the public  
8 interest and will reduce appellants' view, 2) that water quality will  
9 be jeopardized by sewage and oil discharged from water craft using the  
10 marina and 3) that construction of the marina as planned would impair  
11 appellant's opportunity to lease, or the value of a lease of, state  
12 owned aquatic land between the marina site and appellant's tidelands  
13 and uplands.

14 1. Public interest and view. Regarding public interest, RCW  
15 90.58.020 declares that public policy is to "[plan] for and [foster]  
16 all reasonable and appropriate uses . . . [allow] for limited  
17 reduction of rights of the public in the navigable waters" and  
18 "[protect] generally public rights of navigation and corollary rights  
19 incidental thereto". While this requires a recognition of public  
20 rights of navigation, it does not mandate a calculation of equal  
21 public benefits to be offset against private benefits. Portage  
22 Bay-Roanoke Park Community Council v. Shorelines Hearings Board, 92  
23 Wash.2d 1, 592 P.2d 151 (1979). The reduction in public rights of  
24 navigation and corollary rights is here outweighed by the increased  
25 public access to the water afforded by the proposed marina.  
26 Construction of the proposed marina is thus reasonable and appropriate  
27

1 and not contrary to the public interest.

2       Regarding view, we cannot conclude that the proposed marina would  
3 impair appellants' view; rather, it would change the composition of  
4 their view. Appellants did not prove that this would have a negative  
5 effect on their property value. Department of Ecology v. Pacesetter  
6 Constr. Co., 89 Wash.2d 203, 571 P.2d. 196 (1977) cited by appellants  
7 is therefore inapposite. See, Portage Bay-Roanoke Park Community  
8 Council v. Shorelines Hearings Board, supra, at pp. 5-6. The Master  
9 Program, relating to view, requires optimization of "the trade-offs  
10 between the number of boats served and the impacts on the natural and  
11 visual environments" (Sec. 5.13, Marinas, quoted in Finding of Fact  
12 IV, supra). In the context of the high demand for boat storage in San  
13 Juan County which we have found, and the relatively small change which  
14 would be effected in the composition of appellant's view, we cannot  
15 conclude that the proposed marina should be reduced or rearranged.  
16 The proposed marina will constitute the optimum trade-off between  
17 boats served and visual impact, provided that night-time illumination  
18 is provided only by low intensity, low height (18-36 inch) dock lights.

19       2. Sewage and oil from water craft. In order to protect against  
20 adverse effects to the waters of the state, RCW 90.58.020, the  
21 proposed marina should include and use a boat holding tank sewage  
22 pump-out station. The proposed marina should also have materials for  
23 the containment of oil spills. These should be of a kind approved by  
24 the State Department of Ecology.

25       3. Appellant's opportunity to lease state owned aquatic land.  
26 Appellants urge that as owners of uplands and tidelands they hold a  
27

1 preference right to lease the abutting state owned aquatic land. They  
2 concede that respondent Carpenter holds a similar preference right,  
3 with the two aquatic parcels subject to such rights meeting at some  
4 boundary roughly parallel to and between their opposite shores.  
5 Appellants next reason that if the proposed marina were constructed to  
6 that boundary then any future structures which appellant may construct  
7 on the adjacent aquatic land, which appellants may lease, would need  
8 to be set back from that boundary by a distance equal to the full  
9 width of a navigation channel. Such a channel for navigation,  
10 appellants argue, should straddle the boundary rather than being  
11 entirely on appellant's side. While there may be merit in this  
12 contention, the County did not act improperly in issuing its  
13 substantial development permit (No. 25SJ72, June 19, 1979) without  
14 finally resolving that contention. This is so because the  
15 administration and enforcement of leases for state aquatic lands has  
16 been accorded to the State Department of Natural Resources (DNR), see  
17 chapter 43.30 RCW, and is governed generally by Title 79 RCW, Public  
18 Lands. The DNR has not formally established the location of the  
19 boundary between the aquatic parcels in which the parties here claim  
20 preference rights. Likewise, the completion of the proposed marina  
21 will necessitate the issuance of a DNR lease of additional aquatic  
22 lands. DNR will then have the opportunity to position the proposed  
23 marina relative to the boundary that it then establishes. The  
24 positioning of the proposed marina, if any, effectuated by the DNR  
25 lease may or may not be more restrictive than the County's substantial  
26 development permit (25SJ72, June 19, 1979) now before us.

1 In summary, the proposed development is consistent with the Master  
2 Program and Shoreline Management Act provided that the following three  
3 conditions are observed:

4 1. Night-time illumination shall be provided only by low  
5 intensity low height (18-36 inch) dock lights.

6 2. A boat holding-tank sewage pump-out station shall be  
7 installed and used.

8 3. Materials for containment of oil spills, of a type  
9 approved by the State Department of Ecology, shall  
10 be maintained on the site of the marina.

11 The substantive protection afforded by SEPA, See Polygon Corporation  
12 v. Seattle, 90 Wash.2d 59 (1978), did not require the Board of County  
13 Commissioners to condition respondent Carpenter's proposed  
14 development, beyond the conditions imposed by the substantial  
15 development permit (No. 25 SJ72, June 19, 1979) and the three  
16 conditions set forth herein, for compliance with the Master Program  
17 and Shoreline Management Act.

18 V

19 The appropriate test under the appearance of fairness doctrine is  
20 whether a

21 "disinterested person, having been apprised  
22 of the totality of a board member's personal  
23 interest in a matter being acted upon, [would]  
be reasonably justified in thinking that  
partiality may exist?"

24 Swift v. Island County, 87 Wash.2d 348 (1976). See also Buell v.  
25 Bremerton, 80 Wash.2d 518 (1972).

26 We conclude that Commissioner Klauder's personal interest in the  
27 matter of the proposed marina is so remote and tenuous as to leave no

1 one reasonably justified in thinking that partiality may have  
2 existed. We therefore find no violation of the appearance of fairness  
3 doctrine by Commissioner Klauder's participation in the County's  
4 approval of the proposed marina. See Westslope Council v. Tacoma, 18  
5 Wn. App. 328 (1977).

#### 6 VI

7 The substantial development permit does not clearly describe the  
8 proposed development. The matter should therefore be remanded for  
9 incorporation by reference and attachment of the text and  
10 illustrations of Section 5.E. of the draft EIS which sets forth a  
11 description of the proposed development.

#### 12 VII

13 Any Finding of Fact which should be deemed a Conclusion of Law is  
14 hereby adopted as such.

15 From these Conclusions the Board enters this

#### 16 ORDER

17 This matter is remanded to respondent, San Juan County, with  
18 instructions to issue a substantial development permit in the same  
19 form as previously (No. 25SJ72, June 19, 1979); provided, however,  
20 that:

- 21 1. The text and illustrations of Section 5.E.  
22 of the draft EIS shall be incorporated by  
reference and attached, and
- 23 2. The three conditions set out in Conclusion  
24 of Law IV, page 15 herein, shall be added.



1 DATED this 7<sup>th</sup> day of February, 1980

2 SHORELINES HEARINGS BOARD

3 Max W. Washington  
4 MAX W. WASHINGTON, Chairman

5 Chris Smith  
6 CHRIS SMITH, Member

7 David Akana  
8 DAVID AKANA, Member

9 Delmon Anderson  
10 DELMON ANDERSON, Member

11 Richard A. O'Neal  
12 RICHARD A O'NEAL, Member

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27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER